

OLC 78-5327/1

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OCT 16 1978

MEMORANDUM FOR: Director of Central Intelligence

FROM : Frederick P. Hitz
Legislative Counsel

SUBJECT : Senate Select Committee on Intelligence Report
Entitled "National Security Secrets and the
Administration of Justice"

1. Action Requested: None, for information only.

2. Background: The following is a summary of the major points of the Select Committee report discussing the use of classified information in potential criminal prosecutions. The report is a result of a year and a half study by the Subcommittee on Secrecy and Disclosure, chaired by Senator Joseph Biden (D., Del.). The report is principally the product of three staff members, Mark Gitenstein, David Bushong and Keith Raffel. The report has been in preparation since you presented testimony before Senator Biden in open session on 1 March of this year.

3. The Committee's principal conclusions are as follows:

a. "There has been a major failure on the part of the Government to take action in leak cases."

The report points out that there has not been a single successful prosecution of an individual for leaking information to a publication, and attributes this partially to an impasse between the Intelligence Community and Department of Justice on the use of classified information in the prosecution of these cases. The original report concluded "there is a major breakdown in the administration of the criminal espionage statutes in leak cases" but this conclusion was altered because of Tony Lapham's position that leak cases are not punishable under espionage statutes.

b. "Several immediate steps may be taken to facilitate the administration of existing laws, while Congress determines the need for major revision of the espionage statutes. Furthermore, it is possible that improvements in the

administration of existing statutes might affect ultimate decisions on statutory revision."

While there is a wide divergence of opinion within the Committee on what changes are needed in the espionage laws, "a narrowly drawn provision that would punish disclosure of the identity of American intelligence agents appears to be necessary." This is the first time the full SSCI has endorsed such a provision of law. The Committee recommends immediate steps which include:

- Development of administrative procedures for disciplining employees responsible for violations of security or other laws. The Committee's point here is that such proceedings would not confront the problems involved in using classified information in court.

- Centralizing Intelligence Community responsibilities, perhaps in the IOB, of investigations of security breaches which do not constitute crimes.

- FBI should continue to have exclusive responsibility for investigating leaks which may amount to a criminal violation and should initiate an investigation without advance commitment by the Intelligence Community that material can be used in court (a present stumbling block).

- The Attorney General should issue guidelines on the responsibility of the Intelligence Community to report crimes to the Department of Justice and issue procedures under which intelligence agencies are to provide necessary information to DOJ attorneys in connection with criminal investigations or prosecutions.

- Congress should consider enactment of a special omnibus pre-trial proceeding to be used in cases where national secrets are likely to arise in the course of a criminal prosecution. This procedure would require the defendant to alert the prosecution and court to all motions, defenses or arguments planned requiring discovery and disclosure of intelligence information or the use of intelligence witnesses. The judge would be required to rule in advance on the admissibility of the intelligence information, on the scope of the witness's testimony, as well as the relevancy of the defendant's motion or

defense prior to granting discovery of any intelligence information to the defendant.

This recommendation was also modified significantly because of Tony's recommendation. It originally deferred any revision of the espionage statutes until these administrative problems were resolved.

c. "Disagreements over use of classified information in prosecutions also impede espionage prosecutions and have placed the DOJ at a marked disadvantage in perjury, narcotics and possibly even one murder case."

The bulk of the report is devoted to a discussion of the difficulties of using classified information in prosecutions. The report dwells at length on the "gray mail" phenomenon whereby a defendant can escape prosecution or conviction by threatening discovery or use in court of extremely sensitive national security information.

4. Senator Biden is apparently seriously interested in contributing to a solution to these problems. He also serves as Chairman of the Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee, and his staff director, Mark Gitenstein, who is largely responsible for this report, has said this will be that Subcommittee's first order of business in the new Congress. Hearings are planned, probably for January, on the special omnibus pre-trial procedure and on new legislation to protect intelligence employee identities.

Signed - Frederick P. Hitz

FREDERICK P. HITZ

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OLC:DFM:hms (13 October 1978)

16 OCT 1978

TO : Mr. Hitz	DATE OF REQUEST
FROM : DFM	SUSPENSE DATE
SUBJECT: SSCI's report on use of classified information in court	

NOTES

Suggest you forward this memo to the Director. A copy of the full report was forwarded yesterday to [redacted] of the Director's staff.

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COORDINATED WITH (list names as well as offices)

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ACTION REQUIRED BY ~~XXX~~ FPH

Signature on memo to director, and on pink sheet